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NOTE AND COMMENT

THE DOCTRINE OF UNFAIR TRADE.—The decision of the Circuit Court of Appeals of the Second Circuit, in *Rushmore v. Manhattan Screw & Stamping Works*, 163 Fed. 939, has been criticized apparently because it is assumed to be a departure from precedent and an extension of the doctrine of unfair trade farther than it should be carried. The doctrine of unfair trade is very simple, indeed; it is that no one has a right to sell his goods as the goods of another. *Reddaway v. Banham* [1896], A. C. 199; *Shaver v. Heller*, 108 Fed. 821. The principle is perfectly general and without exception. *Saxlehner v. Apollinaris Co.* [1897], 1 Ch. 893, 14 R. P. C. 645, 652. It makes no difference by what means a particular trader's goods are identified, whether by a personal, geographical or descriptive name, a form of receptacle, a style or color of label or by the appearance or configuration of the goods themselves, if it is shown as a fact that any of these things perform the function of identification (which is always a matter of evidence in the particular case), duplication of the particular identifying element by a rival trader, under such circumstances as to render deception of purchasers a probable consequence, will be enjoined. *Hires v. Consumers Co.*, 100 Fed. 809; *Meyer v. Bull*, 58 Fed. 884; *Mills Co. v. Eagle*, 86 Fed. 608.

The extent of the relief is dependent upon the necessities of the situation as shown by the evidence in the particular case. *Reddaway v. Banham* [1896], A. C. 199, 13 R. P. C. 218; *Powell v. Birmingham Vinegar Co.* [1897], A. C. 710, 14 R. P. C. 720, 727.

The only difference between unfair trading by duplication of an arbitrary name or symbol and that accomplished by imitation of form of package, label or style, configuration of goods, or the deceptive use of personal, geographical or descriptive name, is that these arbitrary name or sign can have no significance except as pointing to the origin of the goods. Its province is to denote the commercial origin of the product, or it has no function whatever. Its use by another is therefore presumptively fraudulent and calculated to deceive. But in the case of the imitation of a form of package, color, size or appearance of label or general style, configuration of goods or the use of descriptive, personal or geographical names, evidence must be adduced to satisfy the court that these, besides their ordinary significance or utility, possess a secondary or additional function of identifying the origin of the goods, and when this proof is made the legal consequences invariably follow (*Reddaway v. Banham* [1896], A. C. 199, 13 R. P. C. 218, 224, 228), and the use will be restricted, or, if the facts of the case warrant the holding that no honest use by the second trader is possible, absolute restraint will be imposed. *Montgomery v. Thompson* [1891], A. C. 217, 8 R. P. C. 361. *Sheffield King Milling Co. v. Sheffield Mill & Elevator Co.*, 117 N. W. 447, 450.

The facts in *Rushmore v. Manhattan Screw & Stamping Co.*, 163 Fed. 939, were simple. Complainant was a manufacturer of automobile headlights of a peculiar and distinctive shape. Defendant produced a lamp which was a substantial and unnecessary duplicate of this shape, and, as was found by the court below, this was "the unnecessary imitation of a non-functional part of his well known lamp." Complainant's lamp was known as the Rushmore Lamp and was designated as "Flare Front." Defendant attached to its lamp a plate containing the word Phoebe and its corporate name, as manufacturer. Defendant also used, as applied to its lamps, the name "Flare Front." With respect to the name it was held that the evidence adduced did not establish the secondary meaning of the words "Flare Front," and the order of the court below restraining their use by defendant was reversed; the injunction against the duplication of the visual appearance of the lamps was affirmed.

It seems to be assumed by those who have criticized the ruling in this case that there is involved some novel application of the unfair trade doctrine. As a matter of fact, there are numerous cases in which relief more or less complete has been granted against the deceptive imitation of the form of an article: *Rushmore v. Saxon*, 158 Fed. 499 (involving the Rushmore automobile lamp); *Sterling Remedy Co. v. Spermine Medical Co.*, 112 Fed. 1000 (shape of a cathartic tablet); *Frost v. Estes*, 156 Fed. 677 (clasp of a hose supporter); *Globe Co. v. Brown*, 121 Fed. 90 (filing case); *Fox v. Glynn*, 78 N. E. 89; *Fox v. Hathaway*, 85 N. E. 417 (visual appearance of a loaf of bread); *Buck's Stove Co. v. Kiechle*, 76 Fed. 758 (white enamel oven

lining for stoves); *Elliott v. Hodgson*, 19 R. P. C. 518 (shape of a cigar); *Edison v. Gladstone*, 58 At. 391 (plates for electric batteries); *Muller v. McDonald*, 164 Fed. 1001, 1004 (stop and waste cocks); *Scriven v. North*, 134 Fed. 366 (seams in jean underdrawers); *Victor Co. v. Armstrong*, 134 Fed. 366 (talking machine records); *Yale & Towne v. Adler*, 154 Fed. 37 (padlocks); *Bunker v. Kenna, Price & Steuart*, Am. Trade Mark Cas. 883 (spiral springs for rocking chairs).

There is nothing sacred in the form of an article, there is no reason why any particular form should be permitted to be used under all circumstances, or why the means of promoting deception should be enjoined when consisting of technical trade marks, labels and names, and tolerated when accomplished in other ways.

In *Garrett v. Garrett*, 78 Fed. 472, Judge SAGE said (477):

"It was contended for the defendant, upon the hearing, that every man has a right to the use of his own name in business, and, as to the order of injunction below restraining defendant from using white paper for its labels, that every person has a constitutional right to use white paper. These propositions, in the abstract, are undeniably true, but counsel for the time overlooked the fact that, wherever there is an organic law, wherever a constitution is to be found as the basis of the rights of the people, and as the foundation and limit of the legislation and jurisprudence of a government, there the mutual rights of individuals are held in highest regard, and are most jealously protected. Always, in law, a greater right is closely related to a greater obligation. While it is true that every man has a right to use his own name in his own business, it is also true that he has no right to use it for the purpose of stealing the good will of his neighbor's business, nor to commit a fraud upon his neighbor, nor a trespass upon his neighbor's rights or property; and, while it is true that every man has a right to use white paper, it is also true that he has no right to use it for making counterfeit money, nor to commit a forgery. It might as well be set up, in defense of a highwayman, that, because the constitution secures to every man the right to bear arms, he had a constitutional right to rob his victim at the muzzle of a rifle or revolver."

In *Weinstock v. Marks*, 109 Cal. 529, 42 Pac. 142, which was a case where a competitor imitated the external appearance of complainant's department store, Judge GAROUTTE said (145):

"It may well be said that the defendant, by duplicating plaintiff's building, with its peculiar architecture and immediately adjoining, entering into the same line of business, with no mark of identification upon his store, has dressed himself in plaintiff's garments; and, having so dressed himself with a fraudulent intent, equity will exert itself to reach the fraud in some way."

* * * * *

"If the same evil results are accomplished by the acts practiced by this defendant which would be accomplished by an adoption of plaintiff's name, why should equity smile upon the one practice and frown upon the other? Upon what principle of law can a court of equity say, 'If you cheat and

defraud your competitor in business by taking his name, the court will give relief against you, but, if you cheat and defraud him by assuming a disguise of a different character, your acts are beyond the law?' Equity will not concern itself about the means by which fraud is done. It is the result arising from the means—it is the fraud itself—with which it deals.

The foregoing principles of law do not apply alone to the protection of parties having trade-marks and trade-names. They reach away beyond that, and apply to all cases where fraud is practiced by one in securing the trade of a rival dealer; and these ways are as many and as various as the ingenuity of the dishonest schemer can invent."

The mere addition of the defendant's name (which was done in *Rushmore v. Manhattan Screw & Stamping Co.*) is obviously not a sufficient differentiation, for many persons who know an article and can identify it by some distinctive feature may not know the name of the maker or have in mind his personality. *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Bass v. Feigen-span*, 96 Fed. 206; *Lever v. Goodwin*, 4 R. P. C. 492; 506; *Powell v. Birmingham* [1897], A. C. 710.

This discussion heretofore has ignored the element of fraudulent purpose. An actual wrongful intent is no more an indispensable element in these cases than in any other case of tort. A man is presumed to intend the natural consequences of his acts. *Manitowoc Co. v. Numsen*, 93 Fed. 196; *Cuervo v. Owl Cigar Co.*, 68 Fed. 541, 542; *Rushmore v. Saxon*, 158 Fed. 499, 505. In the case immediately under discussion (*Rushmore v. Manhattan Screw & Stamping Co.*) there was distinct evidence of fraudulent intent on the part of defendant to palm off his lamps as the complainant's. The court expressly found that there was in the makeup of defendant's lamp the "unnecessary imitation of non-functional parts" of complainant's well known lamp. This is of itself significant evidence of a fraudulent purpose on the part of defendant to enable its lamp to be passed off as complainant's (*Singer Co. v. June*, 163 U. S. 169, 202), and while an actual fraudulent intent is not essential, its existence greatly simplifies the proof that the result is calculated to deceive (*Cellular Clothing Co. v. Maxton & Murray* [1899], A. C. 326, 16 R. P. C. 397, 405), for the courts are disposed to credit a person who intends to pass off his goods as another's with enough astuteness to adopt means sufficient to accomplish his purpose. *Slasenger v. Feltham*, 6 R. P. C. 531, 537; *Enoch Morgan's Sons v. Ward*, 152 Fed. 690, 693.

EDWARD S. ROGERS.

VALUING PROPERTY AND FRANCHISES OF PUBLIC SERVICE CORPORATIONS FOR FIXING RATES.—The Supreme Court of the United States has recently decided two important cases relating to the proper valuation of the property of public service corporations for the purpose of fixing rates to be charged for their services. These are *Knoxville v. Knoxville Water Company*, 211 U. S. —, 29 S. C. 148, and *Willcox v. Consolidated Gas Co.*, — U. S. —, 29 S. C. 192, both decided January 4, 1909.

In the first case a master had found the value of the company's property